No. 342

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division

BRIEF OF APPELLANTS OPPOSING THE MOTION OF ATLANTIC COAST LINE RAILROAD COMPANY TO DISMISS THE APPEAL OR AFFIRM THE DECISION OF THE DISTRICT COURT

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UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION; ATLANTIC COAST LINE RAILROAD COMPANY, Intervener,
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Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division

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BRIEF OF APPELLANTS OPPOSING THE MOTION OF ATLANTIC COAST LINE RAILROAD COMPANY TO DISMISS THE APPEAL OR AFFIRM THE DECISION OF THE DISTRICT COURT

Reference to Official Reports of the Opinion Delivered in the District Court, and I. C. C.

The opinion of the Court below was rendered and filed in the Clerk's office on February 24th, 1933 and is cited as "State of Florida, et al., against United States of America, Interstate Commerce Commission; Atlantic Coast Line Railroad Company, Intervener", (not yet reported). The reports and orders of the Interstate Commerce Commission are dated respectively July 5th, 1932 and are cited, "Georgia Public Service Commission vs. Atlantic Coast Line Railroad Company", reported in 186 I. C. C. 157, and January 9th, 1933, cited, "Georgia Public Service Commission vs. Atlantic Coast Line Railroad Company", reported in 190 I. C. C. 588.

Reference to Official Reports of the Opinions Involving an Order of the Interstate Commerce Commission Entered in the Same Proceeding and Set Aside Pursuant to the Decree of the Supreme Court of the United States.

Opinion of the Supreme Court of the United States, dated January 5, 1931, reported in 282 U. S. 194, cited as State of Florida et al vs. United States of America et al;

Opinion of the United States District Court for the Northern District of Georgia, dated January 17th, 1929, reported in 30 Fed. (2d) 116, and cited as "State of Florida, et al., vs. United States of America, et al";

Opinion of the same Court, dated March 22nd, 1929, reported in 31 Fed. (2d) 580, and cited as "State of Florida, et al., vs. United States of America, et al";

Report of the Interstate Commerce Commission dated August 2nd, 1928, cited as "Georgia Public Service Commission vs. Atlantic Coast Line Railroad Company", and reported in 146 I. C. C. 717.

Statement as to Jurisdiction

On April 19th, 1933, the appellants filed and served upon all opposing counsel their separate typewritten statement in compliance with Paragraph 1 of Rule 12 of the Revised Rules of Practice of this Court.

Statement of the Case

This is an appeal from a final decree of the United States District Court for the Northern District of Georgia, Atlanta Division,(1) dated February 24th, 1933, which sitting as a specially constituted three-judge Federal statutory court (38 Stat. at L. 219), denied the relief sought by the appellants (as complainants in equity below) and refused to enjoin an order of the Interstate Commerce Commission contended by the appellants to be unlawful.

The proceedings in the Court below originated in three separate bills and supplemental bills filed respectively by State of Florida and Florida Railroad Commission against the United States of America and Interstate Commerce Commission; Wilson Cypress Company and Wilson Lumber Company of Florida against the United States of America

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(1)—The record being not yet printed no record reference can be made.

and Interstate Commerce Commission; and F. S. Buffum Company, Incorporated against the United States of America and Interstate Commerce Commission. The Atlantic Coast Line Railroad Company intervened in each of the suits.

At the final hearing the several constituent causes were consolidated into a single cause entitled, "State of Florida, et al., complainants, vs. United States of America, and Interstate Commerce Commission; Atlantic Coast Line Railroad Company, Intervener, Respondents". A single final decree was entered in the consolidated cause. The complainants in the constituent and consolidated cause sought and were allowed appeals from the final decree and in due course filed their typewritten statement as to the jurisdiction under Paragraph 1 of Rule 12 of the Revised Rules of Practice of this Court. The Appellee, Atlantic Coast Line Railroad Company filed a statement against the jurisdiction of the Court and with that statement filed a motion to dismiss or affirm the appeal upon the theory that the questions involved in the appeal were unsubstantial. This brief is filed in opposition to such motion under Rule 7, Paragraph 3, and Rule 12, Paragraph 3 of the Revised Rules of Practice of this Court. In this brief we shall examine the merits of the cause no further than to demonstrate the existence of a substantial controversy upon this appeal.

The final decree of the District Court in terms sustained the orders of the Interstate Commerce Commission dated July 5th, 1932 and January 9th, 1933, establishing intrastate rates on logs between points on the Atlantic Coast Line Railroad Company within and throughout the

State of Florida without exception. The order of the Interstate Commerce Commission insofar as it purported to fix intrastate rates was assailed by the State of Florida and the complainants in the other constituent causes as being outside the scope of the issues in the proceeding in which the order was entered and without substantial evidence to support it, as being an arbitrary abuse of Federal power, and as extending beyond the statutory authority of the Interstate Commerce Commission and the limits of the Federal power under the Federal Constitution.

The Original Proceedings Before the Interstate Commerce Commission

The proceedings before the Interstate Commerce Commission were adversary proceedings, instituted by a complaint in which the Georgia Public Service Commission was sole complainant, and the Atlantic Coast Line Railroad Company was sole defendant. The gravamen of the complaint was the alleged unreasonable level of the intrastate rates on logs over six feet in length (except walnut, cherry and cedar) from points of origin in Florida, to destinations in Georgia, and the relationship between that rate on the one hand and the mileage scale of intrastate rates of the same character between points in Florida up to 170 miles on the other hand. The announced purpose of the complaint was to extend the Florida intrastate log rates into interstate commerce from Florida to Georgia.

The Atlantic Coast Line appeared in defense of both the interstate rate and the intrastate rate. The State of Florida was notified pursuant to the laws of congress and

appeared in defense of the intrastate rate. Various interventions were allowed, conditioned that the scope of the proceedings be not broadened. On August 2nd, 1928 the Interstate Commerce Commission filed its report and order. In its report it stated that while the complaint assailed the rates from all Florida points, the record showed that so far as the interstate rates were concerned relief was desired only with respect to the rates on logs "from that portion of Florida lying North of and including Jacksonville, Gainesville, Burnett's Lake and High Springs", described as North Florida, "to destinations in Georgia for distances not exceeding 170 miles". It prescribed interstate rates from points of origin in that small area of North Florida and not elsewhere. (146 I. C. C. 717). No actual movement of logs from Florida to Georgia was shown. But notwithstanding that fact, the Interstate Commerce Commission found that such intrastate rates resulted and would result in undue preference and advantage of shippers of intrastate traffic within the State of Florida, in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against interstate commerce. Accordingly, the Interstate Commerce Commission by its amended and clarified orders fixed statewide, and without exception throughout the State of Florida, intrastate rates for the transportation of logs over the lines of the defendant carrier which were the same as the rates fixed for the non-existent interstate commerce between points in North Florida and Georgia.

The Former Proceedings in the District Court of the United States for the Northern District of Georgia, and in this Court.

Having no recourse to any other remedy The State of Florida thereupon filed its bill in the United States District Court for the Northern District of Georgia, Atlanta Division, that being the forum under the appropriate Federal statute in which it had to proceed, to enjoin the intrastate feature of the order of the Interstate Commerce Commission. Two similar bills were filed by the Florida lumber companies, who are among the appellants in the consolidated cause now at bar. The causes were combined for trial and heard by the United States District Court for the Northern District of Georgia upon hearing and rehearing (30 Fed. 2d 116; 31 Fed. 2d 580). Upon rehearing the District Court declared that the order attacked could not be sustained under Section 3 of the Interstate Commerce Act as amended (the persons and localities section) but could be sustained under Section 13 of the Act as amended, as a burden upon the general revenues of the carrier and thereupon proceeded to enter its decree dismissing the bill of complaint and the supplemental bills.

A direct appeal was taken from the District Court to this Court, and this Court in due course in its opinion and judgment rendered January 5th, 1931 (Florida vs. United States, 282 U. S. 194) reversed the decree of the District Court and ordered "that the portion of the order of the Commission which is now under review with respect to intrastate rates * * * must be set aside." The ultimate ground of the reversal was for "the lack of basic or es-

sential findings required to support the Commission's order. But as an incident to that ultimate finding, this Court examined the scope of the operation of the Federal and State powers and the character and sufficiency of the evidence upon which the Commission attempted to act.

A few days after the coming down of the opinion and before the coming down of the mandate of this Court, the Atlantic Coast Line Railroad Company filed in this Court a motion asserting among other things that the trouble with the order of the Interstate Commerce Commission was procedural only and praying that this Court withhold its mandate until such time as the Interstate Commerce Commission should have made further and additional orders in the proceedings upon the record before the Interstate Commerce Commission. But this Court denied that motion and transmitted its mandate to the District Court. And that mandate in due course was made effective by the order of the District Court and the order of the Interstate Commerce Commission, insofar as it sought to prescribe intrastate rates, was enjoined, annulled and set aside.

The Further Hearings Had Before the Interstate Commerce Commission Under Its Order of April 6, 1931.

At or about the time that the United States District Court for the Northern District of Georgia made, to-wit, on March 7th, 1931, the order that it should have made in the first instance, the complainant, the Georgia Public Service Commission, and the defendant, Atlantic Coast Line Railroad Company, filed simultaneous motions before

the Interstate Commerce Commission which patently were intended to be the one complementary of the other.

The motion of the Georgia Commission requested that the Federal Commission reopen the proceedings and make the determinations required by the situation and prescribe just, reasonable, non-discriminatory and non-prejudicial interstate rates from points in Florida to destinations in Georgia and that those rates be no higher than the Florida intrastate rates in effect at the same time. The motion of the Atlantic Coast Line Railroad Company requested that the Federal Commission reopen the proceedings and make such further findings, reports and orders as it might deem to be requisite or necessary and that it prescribe such intrastate rates in Florida for the transportation of logs for distances up to and beyond 170 miles as might be lawful.

It is thus to be observed that the gravamen and primary purpose of the motion of the Georgia Public Service Commission (like the gravamen of its original complaint) was to invoke the direct Federal power to prescribe reasonable rates for the (non-existent) log traffic in interstate commerce from points in Florida to destinations in Georgia, a thing which the Interstate Commerce Commission had already done in this proceeding by the portion of the order of August 2, 1928, to which no party has ever taken exception. The gravamen and primary purpose of the motion of the Atlantic Coast Line Railroad Company was to invoke direct Federal power to prescribe such intrastate rates "as may be lawful", that is to say, to fix the reasonableness per se of the intrastate rates.

Neither the motion of the Georgia Commission nor the complementary motion of the carrier asserted in issuable

form, or indeed asserted at all, that the level of the Florida intrastate rates was so low as to constitute a revenue burden either upon interstate commerce or upon the general revenues of the carrier.

The State of Florida and the Florida Railroad Commission filed a reply to these motions in which they averred: that in the original proceedings the primary issue was the level of the interstate rate and that the intrastate rate was involved only incidentally in its relation to the interstate rate; that the interstate rates prescribed by the Commission were still in effect and that the Georgia Commission had secured all the relief desired in the proceedings; that the result of the former order of the Commission had been to destroy valuable property and wipe out prosperous communities and likewise to diminish the revenues of the carrier from the transportation of logs; that the Cummer Scale had been voluntarily put into effect by the carrier and had become the lawful state rate in Florida and that no application had been made to the State authorities to change it; that this Court had declared that the reasonableness per se of that rate lay with the State authorities and not with the Interstate Commerce Commission; that the Florida Railroad Commission was ready and willing at any proper time upon the application of anyone to consider and determine in accordance with Florida law the level of the intrastate rate; and that although there had been a parity between the interstate and intrastate rates during the two years in which the former order of the Interstate Commerce Commission had been effective no interstate traffic had developed and none would develop. The reply there-

fore asserted that the motions to reopen the proceedings should be denied.

On April 6, 1931, the Interstate Commerce Commission made an order re-opening the proceeding for "further hearing". The purpose of such "further hearing" was not stated. When the Georgia Public Service Commission proposed to introduce evidence these complainants, directing attention to the state of the record as recited above, asked that the Georgia Public Service Commission, as complainant in the proceeding there, be required to state whether it had abandoned its position that this was not a revenue case and that there was no reason for the increase of any rates. The presiding Examiner ruled that it was not necessary for the Georgia Commission to answer this inquiry, to which ruling an exception was taken.

At the beginning of the re-opened proceedings the State of Florida, through the Chairman of the Florida Railroad Commission, asserted that the authority to determine the reasonableness of the State rates lay with the Florida Railroad Commission; that these rates had been voluntarily initiated more than fifteen years theretofore and when established had become the lawful state rates; that the laws of Florida prohibited any change or increase of those rates without the consent and approval of the Florida Railroad Commission and after due notice to the interested parties and a hearing; that no complaint had ever been made to the Florida Railroad Commission about the level of that rate although its door all that time had been open to anyone dissatisfied with that rate; that the result of the proceedings before the Interstate Commerce Commission had been to injure and destroy intrastate com-

merce within the State of Florida, and to injure and destroy individuals and whole communities in Florida without benefitting anyone in Georgia or in Florida; and that the Florida Railroad Commission considered that the Interstate Commerce Commission was without the power to invade the domain of the State in this matter, but if it had such power it should not exercise it until the Railroad Company had applied to the State of Florida for such relief as it might deem itself entitled to have. To this position the State of Florida throughout these proceedings has steadfastly adhered, and it now and here reasserts that position and insists upon it.

The Georgia Public Service Commission offered no evidence except rate comparisons. Upon the conclusion of its evidence the following motion was made:

> "Come now intervening shipper defendants herein, and in the light of the Examiner's ruling declaring that the undue burden issue is involved in this case by the proceedings of the complainant, respectfully move dismissal of that part of the complaint of the Georgia Public Service Commission, which as thus construed, would allege that the Cummer Scale of the Florida intrastate log rates unduly burdens interstate commerce."

That motion was transmitted to and denied by the Commission.

> Georgia Pub. Serv. Comm. v. Atlantic Coast L. R. Co., 186 I. C. C. 157, 160.

The Examiner, over the objection of these complainants, allowed the Atlantic Coast Line Railroad Company to undertake to prove affirmatively against itself the allegations of the complaint which it had denied in its answer and which it had theretofore expressly disclaimed in stating its position of record in the proceeding.

The insufficiency of the evidence to support the order under attack will be the subject of comment in another portion of this brief. We content ourselves here in pointing out that in the proceedings re-opened by the Commission's order of April 6, 1931, the evidence consisted of rate comparisons and cost studies. Most of the rate comparisons were duplications of those filed in the original proceedings. The cost studies consisted largely of a series of system averages applicable alike to all traffic and were insufficient to demonstrate the cost of the transportation of the particular traffic in question, to-wit, logs. The evidence showed that the dire result prophesied by the Florida interveners that "any material increase in the Florida intrastate rate would either cause them to move their plants to the timber or abandon operations" in the main had been realized. Of the train load shippers, all save one had discontinued transporting logs by the carrier, and millions of dollars of property in plants and communities had been wiped out.

The evidence showed that the traffic in pine logs had all but been destroyed. And that the traffic in cypress and hardwood logs was rapidly running the same course. The presiding Examiner in his proposed report recommended two rates, the one being the rate originally prescribed by the order of the Interstate Commerce Commission which

was condemned by this Court. That rate was to be applicable between all points on the defendant carrier's lines in Florida, except between Hines and Palatka. The rate recommended for the Hines to Palatka movement was 1c per 100 pounds lower than the applicable rate under the scale prescribed by the former order of the Interstate Commerce Commission for that movement. Exceptions were filed to the Examiner's report. On July 5th, 1932, the Commission issued its report and order which is the subject of attack here. The report and order confirmed the interstate rate originally fixed from North Florida points of origin to Georgia destinations by the Order of August 2nd, 1928. No attempt was made in the new report or order to fix interstate rates elsewhere than in that limited area. That report and order found as a fact that no movement from Florida to Georgia had been shown during the two years when the interstate rate and the intrastate rate had been upon the same level. So in its new order the Commission made no finding with respect to persons and localities. But it found the so-called Cummer Scale caused an unjust discrimination against interstate commerce from a revenue standpoint and prescribed for application between all points on the lines of the defendant carrier in Florida the same rate which was prescribed by the order which was set aside by the order of this Court.

Bills in equity were filed to enjoin the order of the Interstate Commerce Commission, the one bill filed by the State of Florida, the other by Wilson Cypress Company and Wilson Lumber Company of Florida. Hearing was had upon them upon September 14th, 1932, and the Court en-

tered a stay of the order of the Commission for not exceeding sixty days.

The Second Re-Opened Proceedings Before the Interstate Commerce Commission.

Meanwhile, in October, 1932, shortly after the filing of the constituent bills in this cause, the appellants the State of Florida and the Wilson Cypress Company and Wilson Lumber Company of Florida filed before the Interstate Commerce Commission their motions and petitions to set aside the order of the Interstate Commerce Commission dated July 5th, 1932 and to re-open the proceedings upon the ground (among others) that at or about the time that the Interstate Commerce Commission was preparing and promulgating its order dated July 5th, 1932, greatly increasing the level of the Florida intrastate rate, the Interstate Commerce Commission was permitting the other trunk line carriers in the Southern and Southwestern rate groups (whose rates had been employed as a standard of comparison for the superseded Cummer Scale) to establish and maintain in interstate commerce (as well as in intrastate commerce) per car rates for the transportation of logs which in practical operation and effect were as low or lower than the Cummer Scale. On October 21st, 1932, the Interstate Commerce Commission entered its order suspending the operation of its order of July 5th, 1932, and the proceedings before it were re-opened the second time for the sole purpose of receiving evidence respecting any change in the rates on logs since the close of the last hearing (that is, taking of the last testimony on July 21st,

1931), the circumstances connected with and the conditions which occasioned such changes, and whether such circumstances and conditions or any of them were present in connection with the log rates of the defendant carrier. Further hearing was had. Meanwhile additional railroads had published tariffs covering the new rates. The record shows that these Newly Reduced Rates had been published by not less than twenty railroads in fourteen Southern and Southwestern States. Such railroads and a general statement of the extent to which the Newly Reduced Rates are applicable over them are as follows:

Nashville, Chattanooga & St. Louis Railway
Between all points on its lines.

Louisville & Nashville Railroad
Between all points on its lines on and South of the Ohio River.

St. Louis-San Francisco Railway
Between all points in Alabama, Mississippi, Florida, Arkansas and Missouri.

Missouri Pacific Railroad
Between all points in Louisiana, Arkansas, Missouri, Oklahoma and Texas.

Illinois Central Railroad
To twelve manufacturing points.

Yazoo & Mississippi Valley Railroad
To twenty manufacturing points.

St. Louis-South Western Railway
Between all Points in Arkansas, Louisiana and Missouri.

Gulf, Mobile & Northern Railroad
Between all points in Mississippi.

Georgia & Florida Railroad
Between all points on its lines.
Chicago, Rock Island and Pacific Railway
Between all points on its lines in Arkansas and Louisiana.
Southern Railway
To nine manufacturing points.
Mobile & Ohio Railroad
To eight manufacturing points.
Seaboard Air Line Railway
To three manufacturing points.
Columbus & Greenville Railroad
To four manufacturing points.
Central of Georgia Railway
To four manufacturing points.
Savannah & Atlanta Railway
To three manufacturing points.
Western Railway of Alabama
To two manufacturing points.
New Orleans & North Eastern Railroad
To one manufacturing point.
Norfolk & Southern Railroad
To one manufacturing point.
Tennessee, Alabama & Georgia Railway.
To two manufacturing points.

The record shows that these Newly Reduced Rates were applicable both in interstate and intrastate commerce on substantially the same level over all or part of all of the railroads specified above within and between Florida, Alabama, Mississippi, Louisiana, Tennessee, Georgia, North

Carolina, Virginia, Kentucky, Missouri, Arkansas, Oklahoma and Texas. As was pointed out above, on some of the railroads the Newly Reduced Rates were made applicable to lumber manufacturing points. On many others, including the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway (Atlantic Coast Line affiliates) they were applicable between all, or nearly all stations, interstate as well as intrastate. There is no doubt that in Louisiana, Mississippi, Alabama, Tennessee, parts of Georgia and Western Florida, the general level of interstate and intrastate rates are on the basis of the Newly Reduced Rates. It will not do to say that the Newly Reduced Rates apply only in the Western portion of Southern territory. The maps attached to the Supplemental Bills show approximately the location of the lines over which they are applicable. For instance, it will be observed that they have largely superseded the so-called "Alabama Scale" in Alabama, (the scale prescribed by the Interstate Commerce Commission for intrastate commerce in Florida was frequently called the "Alabama Scale"). They are in effect in parts of Florida, Georgia, and in Eastern Tennessee as well. We think it fair to say that the Newly Reduced Rates or their substantial equivalent now constitute the general level of intrastate and interstate log rates in the greater part of Southern territory in which the lumber manufacturing industry is still a substantial industry. Some of these were shown to be transit rates, but many of them were shown to be local or proportioned rates. The appellants offered to prove that in practical operation and effect the Florida intrastate scale (the Cummer Scale) was

tantamount to a transit rate, in that substantially all or the greater part of the product manufactured from the logs moved over the lines of the defendant carrier. They offered to prove this by testimony given by the Freight Traffic Manager of the Atlantic Coast Line Railroad in another proceeding. But this testimony was excluded.

Furthermore, the record discloses that the appellant Wilson Cypress Company and Cummer Cypress Company and every other trainload shipper of logs was required by the terms of a written contract with the appellee Atlantic Coast Line Railroad Company (supported by a bond) to ship over the Atlantic Coast Line Railroad and the lines of its connecting carriers, the outbound product manufactured from the inbound logs, providing the rates of competing carriers are not lower. The trainload movement constituted substantially more than the carload movement.

On January 9th, 1933, the Interstate Commerce Commission handed down its second report on further hearing (190, I. C. C. 588). It found as a fact that the Newly Reduced Rates per car of logs regardless of weight are "on substantially the same level as the Cummer Scale" (text 589). Yet notwithstanding all this, the Interstate Commerce Commission fixed the Florida intrastate rate at a level which in practical operation and effect is more than twice that of the new general level which had been established between and throughout most of the Southern and Southwestern rate groups and was rapidly being further extended within them.

The Proceedings in the District Court in the Case at Bar.

Promptly after the filing of the second report of the Interstate Commerce Commission of January 9th, 1933, the appellants respectively tendered their supplemental bills setting up the new and additional facts with respect to the second report and order of the Interstate Commerce Commission on the further hearing, and additional grounds for relief consequent upon it. The supplemental bills were allowed as supplemental pleadings, answers filed, and the causes were consolidated and heard by a Court of three judges on the bills and supplemental pleadings, answers and evidence, and a single decree was rendered thereon on February 24th, 1933. By that decree the orders of the Interstate Commerce Commission in the re-opened proceedings dated July 5, 1932, and the order of the Interstate Commerce Commission in the second re-opened proceeding dated January 9th, 1933, were sustained and the prayers of the bills of complaint to enjoin such orders were refused.

Direct appeal was taken to this Court under section 210 of the Judicial Code (38 Stat. at L. 220). Petition for appeal was duly filed and appeal allowed by the District Court.

THE ASSIGNMENTS OF ERROR AND STATUTES RELIED UPON ON THIS APPEAL

The appellants in due course filed in the District Court their joint and several assignments of errors on which they rely upon the appeal in this Court. A copy of the assignments is printed in the margin.*

The statutes relied upon are set out in the Appendix to this brief.

THE MAJOR QUESTIONS INVOLVED ON THIS APPEAL

The questions raised by this appeal are of far-reaching importance. They involve the scope of the exercise of the National and State sovereignty. With due deference, we here express the view that the Interstate Commerce Commission and the trial court in their decisions have applied to the law and the facts principles which are at variance with the Acts of Congress and with the decisions of this Court. We shall not here attempt to argue in extensio those points, but shall content ourselves merely with a statement of them with no more elaboration than appears to be necessary to that statement.

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*(Title and introductory matter omitted in the printing)

Assignment of Errors.

The District Court erred:

1. In denying the relief prayed in the bills of complaint and supplemental bills of complaint herein.

2. In failing and refusing to suspend, annul and permanently enjoin the orders of the Interstate Commerce Commission herein involved.

3. In holding that an unjust discrimination against interstate commerce had been made to *clearly appear*.

4. In failing to find that no substantial disparity exists between the Florida Intrastate rates on logs and the general level of

POINT I.

On January 9, 1933, and on July 5, 1932, the times at which the Interstate Commerce Commission entered its second and first Reports on the further hearing, there was no substantial disparity between the Cummer Scale of Florida Intrastate Log Rates and the General Level of Interstate Log Rates in the Southern Rate Group, as the Interstate Commerce Commission had permitted and was then permitting such general level to be fixed. During the several months preceding the filing of the Commission's Second Report on Further Hearing the Commission had permitted and was then permitting the General Level of Interstate and Intrastate Log Rates in the predominant part of Southern Territory to be fixed on a substantial parity with that of the Cummer Scale. Hence the Commission was without the power to interfere with the Intrastate Rates in Florida. In Attempting to do so its action was arbitrary and unreasonable.

(Applicable to assignments of Error Nos. 1 to 5, both inclusive, and 32 and 33.)

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rates on logs in interstate commerce in the southern carrier rate group.

5. In failing and refusing to hold that the report and order of the Interstate Commerce Commission of July 5, 1932, as amended, and the report and order of said Commission of January 9, 1933, were unreasonable and arbitrary.

6. In failing and refusing to find that the Interstate Commerce Commission had not made the findings declared by the Supreme Court of the United States to be essential pre-requisites to the making of a valid order of the character here attempted to be made by he Interstate Commerce Commission with respect to Florida intrastate rates on logs.

The Interstate Commerce Commission has never considered or fixed interstate rates on logs to or from points in Florida except from border points in North Florida to Georgia points. The record does not show that a single log has ever moved in interstate commerce from Florida to Georgia. The Interstate Commerce Commission has not sought to justify its invasion of state domain, because of discrimination against persons or localities. It founds its invasion solely upon the revenue features of the Interstate Commerce Act as amended by the Transportation Act of 1920 (Section 13 (4) and Section 15a).

In considering the revenue powers of the Interstate Commerce Commission in this connection, the Supreme Court in the Florida Log Case (Florida vs. United States, 282 U. S. 194), said in part:

> "In construing the statute this Court has held that the general provision of section 13 (4) prohibiting 'unjust discrimination against interstate

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7. In failing and refusing to find that there was no substantial evidence in the record to support the findings declared by the Supreme Court of the United States to be essential pre-requisites to the making of a valid order of the character here attempted to be made by the Interstate Commerce Commission with respect to Florida intrastate rates on logs.

8. In holding that the findings of fact upon which the Interstate Commerce Commission relied to justify its said orders prescribing intrastate rates were warranted by the evidence and were made to clearly appear by the evidence.

9. In failing and refusing to hold that the Interstate Commerce Commission made no finding of the amount of revenue which had been derived in the past by the Atlantic Coast Line Railroad Company from the particular traffic in question under the existing intrastate rate (the Cummer scale).

10. In failing and refusing to hold that the evidence warranted no finding by the Interstate Commerce Commission of the amount of revenue which had been derived in the past by the Atlantic Coast Line Railroad Company from the particular traffic in question under the existing intrastate rate (the Cummer scale).

commerce' and authorizing the Commission to establish intrastate rates to prevent such discrimination, is to be read in connection with Section 15a, both of which were added by Transportation Act, 1920 (secs. 416, 422, 41 Stat. at L 484, 488). There is what this Court has called a 'dove-tailed relation' between the two provisions. The authority granted by section 13 (4) is thus to be considered in the light of the affirmative duty of the commission to fix rates and to take other important steps to maintain an adequate national railway system.

"As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that intrastate traffic should pay 'a fair proportionate share' of the cost of main-

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11. In finding that there was no substantial increase in the log traffic after the Cummer scale of rates was restored following the decision of the Supreme Court upon the former order of the Interstate Commerce Commission.

12. In holding that the refusal of the Interstate Commerce Commission to require the Atlantic Coast Line Railroad Company to produce information as to the number of cars of logs moving within the State of Florida during each of the years 1926, 1927 and 1928, and as to the revenue derived therefrom, constitutes no cause to upset the order of the Interstate Commerce Commission herein involved.

13. In failing and refusing to hold that the interstate Commerce Commission made no finding of the amount of revenue which can be reasonably expected to be derived from the traffic in question under the increased intrastate rate which the Interstate Commerce Commission had ordered established.

14. In failing and refusing to hold that the evidence warranted no finding by the Interstate Commerce Commission of the amount of revenue which can be reasonably expected to be derived from the traffic in question under the increased intrastate rate which the Interstate Commerce Commission had ordered established.

15. In finding that the future log traffic under the intrastate rate on the Atlantic Coast Line Railroad in Florida will likely amount to at least 7431 cars per year.

tenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it." (Wisconsin Passenger Fares Case, 257 U. S. 563; and, New York case ,257 U. S. 591).

"The question in the present cases, then is not one of authority, but of its appropriate exercise. The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power, must clearly appear. Illinois Central Railroad Company v. State Public Utilities Commission, 245 U. S. 493 * * * supra."

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16. In holding that if the log traffic done in Florida on the Cummer Scale is at an out-of-pocket loss, the less of it done the better.

17. In failing and refusing to hold that the Interstate Commerce Commission made no finding that the application of the existing intrastate rate (Cummer Scale) resulted in an impairment of the income of the carrier which caused an undue burden upon the carrier's interstate revenues and obstructed the maintenance of an adequate national transportation system.

18. In failing and refusing to hold that the evidence warranted no finding by the Interstate Commerce Commission that the application of the existing intrastate rate (Cummer Scale) resulted in an impairment of the income of the carrier which caused an undue burden upon the carrier's interstate revenues and obstructed the maintenance of an adequate national transportation sytem.

19. In failing and refusing to hold that the Interstate Commerce Commission made no finding that an undue burden upo the carrier's interstate revenues and obstruction to the maintenance of an adequate national transportation service existed which was of such character and consequence that it was the affirmative duty of the Interstate Commerce Commission as an important step in maintaining

The ultimate "purpose of the Congress" was expressed in Section 15a of the Act and was to maintain an adequate national railway system (Wisconsin Passenger Fares case, supra), and to that end Section 15a made it the affirmative duty of the Interstate Commerce Commission in the exercise of its power to prescribe just and reasonable rates to,

> "initiate, modify, establish or adjust such rates so that such carriers as a *whole* (or as a *whole* in each of such *rate groups* or territories as the Commission may from time to time designate) will under honest efficient management * * * earn an *aggregate* annual net railway operating income equal, or as nearly as may be, equal to a fair return upon the *aggregate* value of the railway property of such carriers held for and used in the service of transportation * * * " (Italics ours.)

Section 15a also provided for the recapture of excess earnings from the strong roads and the creation of a general railway revolving fund from which loans and advances might be made to the weak roads. The affirmative duty with respect to fixing rates imposed by Section 15a.

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an adequate national railway system to remove such burden and obstruction.

20. In failing and refusing to hold that the evidence warranted no finding by the Interstate Commerce Commission that an undue burden upon the carrier's interstate revenues and obstruction to the maintenance of an adequate national trasportation service existed which was of such character and consequence that it was the affirmative duty of the Interstate Commerce Commission as an important step in maintaining an adequate national railway system to remove such burden and obstruction.

21. In failing and refusing to hold that the Interstate Commerce Commission made no finding that the alteration of the intrastate rates would produce, or was likely to produce an additional and greater amount of income, and made no finding, that such additional

related to all carriers as a *whole*, or to all in each rate group as a **whole**, and was to **aggregate** income as distinguished from the income of a particular carrier and the recapture clause was the "heart of the plan."

Dayton-Goose Creek R. Co. vs. United States, 263 U. S. 456, text 485.

Shortly after the Transportation Act of 1920 became the law, the Interstate Commerce Commission, with all the rail carriers of the United States before it, determined that in the performance of its duty under Section 15a, the railroads of the nation ought to be divided into four "rate groups" or territories: the Eastern, the Southern, the Western, the Mountain Pacific. The Southern rate group or territory comprised the territory east of the Mississippi River and south of a line drawn approximately westwardly through Richmond, Virginia, and along the Ohio River. It

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and greater amount of income was necessary to prevent an existing undue burden upon the carrier's interstate revenues and necessary to maintain an adequate national transportation service.

22. In failing and refusing to hold that the evidence warranted no finding by the Interstate Commerce Commission that the alteration of the intrastate rates would produce, or was likely to produce an additional and greater amount of income, and that the evidence warranted no finding that such additional and greater amount of income was necessary to prevent an existing undue burden upon the carrier's interstate revenues and necessary to maintain an adequate national transportation service.

23. In failing and refusing to hold that the Interstate Commerce Commission made no finding of the quantity or extent of any burden upon the interstate revenues of the carrier caused by the application of the existing Florida intrastate rate (Cummer Scale).

24. In failing and refusing to hold that the evidence warranted no finding by the Interstate Commerce Commission of the quantity or extent of any burden upon the interstate revenues of the carrier caused by the application of the existing Florida intrastate rate (Cummer Scale).

25. In failing and refusing to hold that in making said orders the Interstate Commerce Commission considered and gave effect to rate comparisons, system average costs and other matters relating to

comprised what theretofore had been and still is Southern Freight Classification Territory. 58 I. C. C. 220. Increases in interstate freight rates were as follows:

Eastern Group	40%
Southern Group	25%
Western Group	35%
Mountain Pacific Group	25%

Horizontal increases in passenger fares were also allowed to all groups, 58 I. C. C. 220.

No power or duty to deal with intrastate rates was conferred or imposed by Section 15a. Wisconsin Passenger Fares case, supra. The power of the Federal Commission to deal with intrastate rates arises under Section 13 (4) of the Act, and only then when the disparity between the state and interstate rates is so great and the State rate is so low as to cast a substantial burden upon general interstate commerce and thus interfere with the **"purpose of the Congress"** set forth in Section 15a, to maintain a **national transportation system.**

Wiscohsin case, supra; New York case, supra;
Florida Log case, supra.

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costs of transportation which were incompetent and insufficient to furnish the basis for the conclusions reached therefrom and incompetent and insufficient to furnish the basis for any such reports and order.

26. In finding that "In 1928 and 1932 comparisons of these rates (Cummer Scale) with other rates on logs and on similar traffic in the same and neighboring territories showed them to average less than half of most other comparable interstate and intrastate rates, and to be much the lowest of any of them."

27. In finding that on the question of the cost of the service figures were considered which showed the average cost of hauling logs over the Atlantic Coast Line Railroad system.

28. In holding that Appendix E of the report of the Interstate Commerce Commission is the conclusion of that Commission "as to

It is only when it "clearly appears" that the interstate traffic is bearing substantially more and the intrastate traffic substantially less than its fair proportionate share of maintaining the national transportation system that the Federal power arises or can be exercised under Section 13 (4) as an incident to the performance by the Commission of its duties under Section 15a.

New York case, supra; Florida Log case, supra.

The Interstate Commerce Commission in its Second Report of January 9, 1933, has found that the new rates established on the other carriers in interstate and intrastate commerce are on substantially the same level as the Cum-

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the cost of hauling logs in Florida for the distance shown to be the average under the Cummer Scale, based on the evidence which had been produced to it as tending to show such cost."

29. In finding that there was "an out-of-pocket loss to the carrier in the log traffic under these rates (Cummer Scale)."

30. In holding that if it appeared that a loss was produced by the State Rates which would in the future be substantial and that the carrier was not in position to absorb it without detriment to its service and support as an interstate carrier, a sufficient case had been made to find an unjust discrimination against interstate commerce and to require its correction.

31. In failing and refusing to hold that the Interstate Commerce Commission by indirection seeks to determine the reasonableness per se of the Florida intrastate rate (the Cummer Scale), a thing which the Supreme Court of the United States has delared lies with the State authority and not with the Interstate Commerce Commission.

32. In failing and refusing to hold that said Interstate Commerce Commission has attempted to prescribe intrastate rates in Florida applicable to territory for which no interstate rates have been prescribed and in which no general invesigation of rate levels whether on interstate or on intrastate traffic has been made, and that in so doing the Interstate Commerce Commission has exceeded its authority.

33. In failing and refusing to hold that the intrastate rates prescribed in said proceeding before the Interstate Commerce Commission are broader in their scope than the interstate rates prescribed in said proceeding, and that said orders of said Commission prescribing said intrastate rates are consequently unlawful.

34. In holding that the proceeding before the Interstate Com-

mer Scale. As a matter of fact, they are substantially lower than the Cummer Scale in the highbracket weights. That report attempts to make some point of the fact that some of the new rates are transit rates. But that is beside the point. For Section 15a of the Interstate Commerce Act as amended is concerned with "the aggregate" income of **all** the carriers **"in the rate group."** So if any carrier in the Southern group receives the outbound traffic "the purpose of the Congress" is satisfied. And the Commission's last report (Jan. 9, 1933) affirmatively shows that the log traffic at the new rates was attractive to the railroads which have established it, if such railroads received the outbound lumber movement (Report 190 I. C. C. p. 592). Furthermore, as we have shown elsewhere herein, the appellants offered to prove the Cummer Scale, in practical operation and ef-

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merce Commission was one in which a burden by the State rates on the revenues of the carrier was made an issue so that the Commission could properly so find and on that ground prescribe an intrastate rate.

35. In failing and refusing to hold that the question of whether or not the jurisdictional facts exist which warrant the Interstate Commerce Commission in invading the domain of the State of Florida is a judicial question which the Court was bound to determine for itself in this cause, and in failing and refusing to determine the existence or non-existence of such jurisdictional facts idependently of any determination thereof by the Interstate Commerce Commission.

36. In failing and refusing to find that the complainants were entitled to a trial de novo by the Court upon the jurisdictional facts which would warrant the Interstate Commerce Commission in invading the domain of the State of Florida by said reports and orders of said Commission, and in failing and refusing to grant such trial upon such facts.

37. In holding that when the question of the existence of the facts with respect to intrastate rates upon the existence of which the power of the Interstate Commerce Commission to act depends, has been tried before that Commission its conclusion affirming the existence of those facts is sufficient to put the burden upon those who deny it.

38. In holding with respect to the power to deal with intrastate rates "that under the enlarged and positive powers with which the Interstate Commerce Commission is vested its findings of fact within

fect, was a transit scale, in that all or substantially all of the product of the logs moved out over the Atlantic Coast Line's tracks, and every time the carrier objected and the objection was sustained by the Examiner.

There has been no change in the boundaries of the Southern group since its was designated by the Commission pursuant to Section 15a. We have demonstrated that during the past few months the Commission has given its acquiescence and tacit approval to the Newly Reduced Rates which are as low as, or lower than, the Cummer Scale in Interstate Commerce between nearly all of the states in the Southern group. We have shown that in most of those states most of the railroads have established in intrastate

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the scope of its powers will not be rejected by the Courts if supported by evidence."

39. In holding that in dealing with intrastate rates a plain case to the contrary of the conclusions reached by the Interstate Commerce Commission is necessary to warrant Court interference.

40. In failing and refusing to find that the report and order of the Interstate Commerce Commission of July 5, 1932, as amended, and the report and order of the Interstate Commerce Commission of January 9, 1933, constitute an unlawful exercise of power by said Commission and are without warrant or authority of law.

41. In failing and refusing to find that the reports and orders of the Interstate Commerce Commission herein involved constitute an unlawful invasion of the sovereign rights of the State of Florida reserved to it under the Constitution of the United States and of the citizens of the State of Florida and are without any warrant or authority of or under the Constitution of the United States.

42. In failing and refusing to find that said Interstate Commerce Commission was and is without jurisdiction to enter said reports and orders herein involved.

43. In holding that the particular findings of the Interstate Commerce Commission are sufficient to support the general finding of unjust discrimination by the state rate against Interstate Commerce by undue burden on the Interstate carrier's revenues, and to justify an order removing the discrimination by establishing the new rate prescribed.

44. In sustaining and upholding the orders of the Interstate Commerce Commission made July 5, 1932, and the order of the Interstate Commerce Commission confirming the same made January 9, 1933.

commerce (as well as interstate commerce) those new rates during that same period. The record shows that the Commission was permitting this to be done at the very time when it was attempting to increase the Florida intrastate rate to more than double what has become and is becoming the general level of interstate and intrastate rates in the Southern and southwestern rate groups. The record shows that more railroads throughout this and adjoining groups each month are establishing the newly reduced rates in interstate commerce and in intrastate commerce. Under these circumstances it will not do to assert that the "justification" for the exercise of Federal power to invade the domain of the State has been made to "clearly appear" or to appear at all. In nearly all instances these newly reduced rates have been experimentally established for a limited period of future time to meet motor truck competition. The fact that they have been established for what might be a limited time and to meet motor truck competition can make no difference. They were and are in force and effect.

POINT II

The Interstate Commerce Commission Has Failed to Make the Basic or Essential Findings Necessary to Support a State-wide Order Prescribing Intrastate Rates. There Is No Substantial Evidence Before the Commission to Support Such Findings.

(Applicable to Assignments of Error Nos. 1 to 10 incl., 13, 14, 15, 17 to 24 incl.)

This Court in the Florida Log Case (Florida vs. United States, 282 U. S. 194, 215) said in part:

> "The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service.
>
> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (Beaumont, S. L. & W. R. Co. v. United States, decided November 24, 1930, 282 U. S. 74, ante, 221, 51 S. Ct. 1), but of the lack of the basic or essential findings required to support the Commission's order."

Our view is that the order of the Interstate Commerce Commission and the record of its proceedings are deficient both as to basic and essential findings and as to evidence upon which the same could be made. Under this heading the point is made as to ultimate findings and the evidence necessary to support them. Under subsequent headings we point out the deficiencies with respect to certain particular findings and the want of evidence to support them.

POINT III.

There Was No Finding and No Evidence of the Amount of Revenue Which Had Been Derived in the Past from this Particular Traffic in Question Under the Cummer Scale of Rates.

(Applicable to assignments of errors Nos. 6, 7, 9, 10, 29.)

The report of the Interstate Commerce Commission does not purport to find the amount of revenue derived in Florida from the Cummer Scale of rates and there is no evidence from which any such finding could be made. This data could have been produced. Demand was made by the State of Florida at the commencement of the hearing in the re-opened case as continued under order of April 6, 1931, but the Atlantic Coast Line Railroad Company declined to produce such data. The State then petitioned the Interstate Commerce Commission to require the production of such data. This the Interstate Commerce Commission declined to do. The Commission in its first report in the re-opened proceedings (dated July 5th, 1932) (186 I. C. C. text 188) declares,

> "While the record shows that defendant's Florida log traffic declined considerably after the increase of rates on February 8, 1929, the record further shows that there was no substantial increase in the movement after the Cummer Scale was restored on April 10, 1931."

There is no evidence of record to support the state-

ment that there was no substantial increase in the movement after the Cummer Scale was restored on April 10, 1931. At no time did the carrier offer evidence to show the amount of revenue derived or the amount of movement had under the Cummer Scale either before or after the entry of the unlawful order of the Interstate Commerce Commission dated August 2nd, 1928, or after that order was set aside.

POINT IV

There Was No Finding as to the Amount of Revenue Which Can Reasonably Be Expected to be Derived by the Carrier from the Traffic in Question "Under the Increased Rates."

(Applicable to Assignments of Error Nos. 12, 13, 14, 15).

The finding with respect to future revenue from the proposed increased rates is utterly insufficient. Its finding with respect to revenue to be expected from the traffic in question under the increased rate is based entirely upon what "it seems probable" may be expected "under normal economic conditions."

The report of the Commission dated July 5th, 1932, sets forth the fact that during the two years in which the high rate was ineffect the total movement of logs in Florida was 18,602 cars. It then deducts 3,740 cars which moved in certain trainload movements which have ceased and which the Commission there asserts will not be re-

sumed. It then makes the following observations (p. 188 of the report):

> "**Under normal economic conditions it seems probable** that the annual volume of the Florida log movement under rates the same as those previously prescribed will not be less than the average of this two-year period minus the number of cars included in the discontinued trainload movements. This average is 7,431 cars. That the movement will not be less than this **under normal conditions** is confirmed by the fact during the five months immediately preceding the last hearing in this case, February to June, 1931, when conditions were abnormal, there were shipped over defendant's lines in Florida a total of 2,765 cars of logs. This movement was at the rate of 6,636 cars a year. **We believe** that the movement of logs intrastate in Florida over defendant's lines will not be **materially curtailed** under the rates which we here prescribe, which are the same or substantially the same as the rates generally in effect and under which logs freely move throughout the South." (Bold type ours.)

The report then figures the amount of revenue collected on the cars which moved in this two year period and the amount of revenue which would have been collected on the same cars under the Cummer Scale and proceeds at p. 189:

> "Accordingly, on the basis of an average of 7,431 cars a year **under normal economic conditions** which basis **we believe** conservative, the gross revenues under the rates prescribed by the previous order herein would be more than $100,000 a year greater than under the Cummer Scale now in effect." (Bold type ours.)

There is no substantial evidence in the record to support the estimate of the number of cars which may move under normal conditions. But putting that on one side, we point out that the Commission here speaks without conviction and without certainty and does not purport to make "findings" in any sense of the word. As we have pointed out, in the **Illinois Central Case, 245 U. S. 493,** at page 510, this Court said that an order of the Commission should not be given precedence over a State rate otherwise valid, "unless, and except so far as it conforms to a **high standard of certainty.**" (Bold type ours.) These doubtful and ambiguous conjectures are not to be considered as conforming to a "high standard of certainty."

Every one of these indefinite expressions is applicable only "under normal economic conditions." The Commission is prescribing a rate for present application and not a rate to become effective upon the return of Normal Economic Conditions. We have had no "normal economic conditions" in Florida for many years, and one of the great contributing factors to our having no "normal economic conditions" has been the former order in this proceeding of the Commission. Certainly the report does not even purport to predict when "normal economic conditions" will prevail. The

quotation we have above set forth recognized that conditions were abnormal in the period from February to June, 1931: Does the Commission find that conditions are any less abnormal today? It is prescribing a rate for present application which it does no more than attempt to justify under "normal economic conditions".

No longer ago than January 4, 1932, this Court considered conclusions based on normal economic conditions for application in the present day. That was in the case of **Atchison, T. & S. F. Ry. Co. vs. United States, 284 U. S. 248.** There the Commission had made a general investigation of grain rates in Western territory. The record was closed in September, 1928 and the matter submitted on July 1, 1929 to the Commission for its decision. The Commission made an order on July 1, 1930, effective October 1, 1930, which effective date was subsequently postponed. A petition for rehearing by the carriers was denied in November, 1930 and they filed a further petition for rehearing in February, 1931 setting up the changes in economic conditions and in their own condition and in the traffic which had occurred in all this intervening time. This second petition for rehearing was denied and this Court, speaking through Mr. Chief Justice Hughes, declared the denial of that petition was "a denial of right" and that the Order of the Commission therefore could not be sustained. In the course of the opinion the Court said:

> "There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is

the outstanding contemporary fact, dominating thought and action throughout the country.

* * * * * * * *

"It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory cannot be regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements."

* * * * * * * *

"It is said that 'in performing its legislative function of prescribing reasonable rates, the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record' and that its determination 'cannot reflect accurately fluctuating conditions.' These suggestions would be appropriate in relation to ordinary applications for rehearing, but are without force when overruling economic forces have made the record before the Commission irresponsive to present conditions. **This is not the usual case of possible fluctuating conditions but of a changed economic level".** (Bold type ours.)

From the foregoing quotation it is readily apparent that this Court would not consider even a definite finding if based upon "normal economic conditions" appropriate or sufficient to support an order applicable for present abnormal conditions. The standards of 1928 will not do for 1931, said the Court, and we assert that it is even more true that the standards of 1929 will not do for 1932.

Nor was there any evidence upon which any finding could be made as to the amount of revenue which could reasonably be expected to be derived by the carrier from the log traffic under the increased rates. The Commission to confirm what the movement would be in normal times, recites in its report dated July 5th, 1932 (text 188) that 2,765 cars moved over the lines of the defendant carrier between February and June, 1931, when conditions were abnormal. During that particular period the Cummer Scale and the rate prescribed by the Interstate Commerce Commission were each in effect about one-half the time, and there is nothing to show how many cars of logs moved under the one or the other, or what the revenue was under the one or the other. At this same place in its report dated July 5th, 1932 (text 188) the Commission expressed the belief that the log movement in Florida would not be materially curtailed under the prescribed rate, which, said the Commission, "are the same or substantially the same as the rates generally in effect, and under which logs freely move, throughout the South". In that report of July 5th, 1932, the Commission overlooked what it recognized in its report of January 9th, 1933, that many if not most of the carriers throughout the South with whose rates the Commission had compared the Cummer Scale were then publishing or preparing to publish rates which in practical operation and effect were substantially upon the level of the Cummer Scale, in an attempt to attract the log traffic to their lines. Thus, the second report of the Commission on the further re-opened proceeding, filed January 9th, 1933, demonstrates that logs will not move freely in the South at a scale sub-

stantially in excess of the Cummer Scale, a thing testified to in the original proceedings, recognized by this Court in its opinion in the Florida Log Case (supra), and demonstrated by the record in the re-opened proceedings before the Commission to be the experience of all concerned during the two year period when the unlawful order, dated August 2nd, 1928, of the Interstate Commerce Commission was in force and effect.

It is difficult to understand how any such statement could be *made in the report of the* Interstate Commerce Commission, as that the log movement would not be materially curtailed under the prescribed rate. For the uncontradicted testimony is that as a direct result of the order, a thriving town of five thousand people (Eastport) was destroyed, the mill there dismantled and moved to the timber; and as a direct result of those proceedings the mills at Milldale and Ortega were dismantled and destroyed, and the revenue from the transportation of pine logs in trainload quantities alone reduced from more than $450,000.00 in 1926 and more than $350,000.00 for 1928 (the last year of the Cummer Scale) to less than $6,000.00 during the year 1930 (the second year of the high rate) for all movements of pine logs (carloads as well as trainloads). The extent to which the revenues on cypress logs and hardwood logs was reduced is not shown by the record. But the Wilson Cypress Company shipped approximately 8,000 cars of cypress logs in trainloads during the two year period of the high rate (or about half of all logs shipped during that period). And its president testified that this movement would cease if the Cummer Scale were effectually increased.

POINT V.

There Was No Sufficient Finding and No Evidence Upon Which the Commission Could Base a Sufficient Finding That the Alteration of the Intrastate Rate Would Produce or Would Be Likely to Produce Additional Income Necessary to Prevent an Undue Burden and to Maintain an Adequate (National) Transportation System.

(Applicable to Assignments of Error Nos. 1, 2, 3, 5 to 11 inclusive, 17 to 31 inclusive.)

As a preliminary to its estimate of what the revenue results would be from the prescribed intrastate scale "under normal economic conditions", the Commission declares in its conclusions and findings in its report of July 5th, 1932 (186 I. C. C. text 189):

> "The record shows the low earnings of the defendant; the low earnings on its log traffic as compared with its earnings on other low grade commodities; the much lower earnings on its Florida log traffic than on its interstate log traffic; and the much lower level of the Cummer Scale than on other scales interstate and intrastate throughout the South. These facts and the cost evidence clearly warrant the conclusion that the traffic moving under the Cummer Scale does not pay its fair proportionate share of operation and maintenance alone".

Brief comment upon this statement of the Commission may well here be made. The "facts" and "cost evidence" do not warrant any such conclusion, even if they were pertinent to that question. The low aggregate earnings of the defendant carrier in and of themselves are insufficient to warrant the raising of the level of a particular rate.

Dayton-Goose Creek Railroad Company vs. United States, (supra).

The comparison of the "earnings" on the log traffic of the carrier with the "earnings" on the other low grade commodities and the comparison of its "earnings" on its Florida log traffic with the "earnings" on its interstate log traffic does not pretend in any instance to be net earnings. They are largely, if not wholly, the result of computation, and bear no relation to cost of service. As this Court pointed out in the Florida Log case, supra, text 213, 214, such estimates will not justify the invasion of state domain by the Federal power.

When the report and order of the Interstate Commerce Commission of July 5th, 1932 was published, the level of the interstate and intrastate log rates throughout the South had so changed and was so changing (and with the permissive sanction at least of the Interstate Commerce Commission) that before the order became effective the general level in practical operation and effect was substantially that of, or lower than, the Cummer Scale. It was solely upon those "facts" and the "cost estimates" that the Commission reached the conclusion that "the traffic

moving under the Cummer Scale does not pay its fair proportionate share of operation and maintenance alone".

The so-called cost evidence to which the Commission makes reference is no more nor less than a series of computations based upon system averages. The costs so shown are not the cost of transporting logs. They are, in fact, no more nor less than the cost of transporting freight of all kinds, high priced as well as low priced, high revenues as well as low revenues, fruits and vegetables as well as logs. This is true of Exhibit E prepared by the Commission itself, as well as of the evidence produced by the carrier. The arbitrary adjustments attempted in those computations in no wise meet the inherent vice of system averages, and throw no substantial light upon the cost of transporting the particular traffic.

The system average method of determining the cost of transporting a particular commodity has been condemned by this Court in,

> Northern Pacific Ry. Company vs. Department of Public Works, 268 U. S. 39,

and has been condemned by the Interstate Commerce Commission itself in,

> California Growers & Shippers' Protective League v. Southern Pacific Railway Company, 129 I. C. C. 25, 52, and authorities cited.

In this very proceeding the Commission declared that this method could not be accepted as indicating the average

out-of-pocket cost of transporting logs in Florida (186 I. C. C. text 183). But because the Commission deems the costs are higher in Florida than elsewhere on the carrier's system, the Commission declares that system average costs which are not permissible to be used elsewhere for a like purpose, may be used in Florida to determine the cost of transporting logs in that State (186 I. C. C. text 184).

But all of this is beside the point. For the Commission nowhere has found what, if any, amount of additional income would be produced by the present alteration of the intrastate rate under existing economic conditions. As we pointed out under Point IV of this brief, its estimates as to the extent of the movement and the amount of gross revenue are confined solely to the movement which will occur and the revenue which will be derived per annum under "normal economic conditions". As we there pointed out, these estimates were frankly founded upon the express belief that the log movement in Florida would not be materially curtailed under the prescribed rate and that the rates prescribed are "the same or substantially the same as the rates generally in effect and under which logs move freely throughout the South".

We pointed out how obviously contrary to the record the first of those assumptions was and how the second had been shown by subsequent proceedings even more at variance with the facts than the first, due to then existent and subsequent alterations of the level of interstate and intrastate log rates elsewhere in the South, including those on the Frisco System and the Louisville & Nashville Railroad Company in interstate commerce in Florida. Nor was

there any finding with respect to the amount of any traffic burden imposed by the Cummer Scale under present economic conditions. From its estimate that under "normal economic conditions" the gross rates prescribed by its order would be more than $100,000 a year greater than the Cummer Scale, the Commission deduced that some **part** of that $100,000 would constitute a dead loss in net revenue under the Cummer Scale. Text 189. The Commission did not estimate what that part would be under "normal economic conditions." It did not estimate what, if any, sum it would be under existing "economic conditions." The Commission's report recognized the then existing economic conditions were not normal economic conditions. It did not prophecy when normal economic conditions would return. Yet, this is the ultimate finding upon which the Interstate Commerce Commission would base its invasion of State domain.

Even if this finding were applicable to existing economic conditions as distinguished from normal economic conditions, it would fall far short of the requirements of the Wisconsin Fares Case supra, the New York Case, supra, and the Florida Log Case, supra, with respect to the substantial disparity and substantial burden which must be made to **clearly appear** before the Interstate Commerce Commission is authorized to invade State domain.

POINT VI.

Even If It Were Possible to Find Any Unjust Discrimination Against Interstate Commerce in This Proceeding, There Is No Finding and No Evidence Upon Which the Commission Could Base a Finding That That Discrimination Was of Such Character and Consequence That It Was the Affirmative Duty of the Commission, as an Important Step in Maintaining an Adequate National Railway Transportation System, to Remove It.

(Applicable to Assignments of Error Nos. 17 to 26 inclusive, 30, 43, 44.)

We now examine the character of burden which the Commission says exists. At pages 188-189 the report of July 5, 1932, discusses the number of cars of logs that moved in Florida during the two years of the high rate and the revenue derived therefrom. It discards the cars that moved in the trainloads to Brooks-Scanlon Corporation and to Cummer Cypress Company for it recognizes that those movements are ended. It determines the remaining cars to be 14,862 and computes the revenue derived on those cars under the high scale formerly prescribed by it during these two years, and the revenue which would have been derived on the same cars under the Cummer Scale, and it concludes:

> "Accordingly, on the basis of an average of 7,431 cars a year under normal economic conditions, which basis we believe conservative, the

gross revenues under the rates prescribed by the previous order herein would be more than $100,000 a year greater than under the Cummer Scale, now in effect. The application of the Cummer Scale, therefore, places a substantial burden upon defendant's interstate revenues. If the revenues yielded by the Cummer Scale are not sufficient to cover the cost of the service, as the cost evidence indicates, it would follow that part of the above-stated amount would constitute a dead loss in net revenue."

The record shows some 18,602 cars of logs moved intrastate during the two years following the increase in rates under the unlawful order of the Interstate Commerce Commission. 186 I. C. C. text 188. As has been pointed out, the Commission found that 3,740 of these cars moved in trainload movements that had ceased and would not be resumed. Text 188. Approximately eight thousand of this number which the Interstate Commerce Commission divides between two years of "normal economic conditions" moved in trainloads from Hines to Palatka. There will be no more trainload movements to Palatka under the high rate, according to the uncontradicted testimony of the president of that company. This alone would more than reduce the Commission's figures by half. In other words, the critical national situation requiring invasion of State domain and prerogatives by Federal power and all this record and effort is said to be an annual sum which "under normal economic conditions" would amount to some indeterminate part of $100,000. What it would amount to in

the abnormal years 1933—or the many abnormal years which may confront us, is wholly unmentioned in the report.

This Court has pointed out the kind of burden which justifies the invasion of the domain of the State by the Interstate Commerce Commission to fix State rates. In considering this question it is necessary to review briefly the history of the creation of the power sought to be exercised and the discussions thereof by this Court.

The power to change State rates in order to remove a revenue burden on interstate commerce is not directly granted to the Interstate Commerce Commission by any section of the Interstate Commerce Act. On the contrary, Section 1 (2) provides specifically that the provisions of the Act shall not apply "to the transportation of passengers or property * * * wholly within one State * * * ".

Section 13 (4) specifically vests the Commission with authority to prescribe intrastate rates where necessary to remove "preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate commerce or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce."

Section 15 (a) provided that "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management, and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as

nearly as may be, to a fair return upon the aggregate volume of the railway property of such carriers held for and used in the service of transportation."

Prior to the enactment of these sections which were a part of the Transportation Act of 1920, this Court had held, in the **Shreveport Case, 234 U. S. 342,** that the Interstate Commerce Commission had power to remove discrimination against persons and localities in interstate commerce. The new act, therefore, simply incorporated in the statute the power as to discrimination against persons and localities which the Commission had already exercised and the Court upheld. **Board of Railroad Commrs. v. Great Northern R. C., 281 U. S. 412.**

Nowhere in the Act is the power expressly given to change intrastate rates in order to remove a revenue burden upon interstate commerce generally. But this Court, in **Wisconsin Railroad Commission v. C. B. & Q. R. Co., 257 U. S. 563,** held that in view of the purpose of the Act and the impossibility of accomplishing that purpose if State traffic did not contribute its fair proportion to the cost of the maintenance of the national transportation system, the dove-tail relation between Section 13 (4) and Section 15 (a) authorized the interpretation that the Commission was thereby vested with power to remove a revenue burden on interstate commerce, caused by State rates.

Thus the necessity to so interpret the Act as to make it workable caused this Court, as said by Circuit Judge Batts, in **Eastern Texas R. Co. et al v. Railroad Commission of Texas, et al., supra,** (referring to the Shreveport case) "to carry the rules of interpretation to the extreme limit" and, as also said by Judge Batts in the same opinion, "cer-

tainly, the authority will not go beyond the necessity".

In only three cases has this Court considered this power of the Commission and the circumstances under which its exercise will be sustained. The first two of these were the cases in which the rule was announced, **Wisconsin Railroad Commission v. C. B. & Q. R. Co., 257 U. S. 563 and New York v. United States, 257 U. S. 592.** The third case was this **Florida Log Case,** in which the Court set aside the previous order of the Commission in this proceeding. In the Wisconsin and New York cases, where the rule was first laid down, it was shown that the Interstate Commerce Commission, in the performance of its duties under Section 15a of the Act, had prescribed a general level of rates for interstate application of carriers in the group and that the state authorities of Wisconsin and New York had declined to permit the rates applicable to State traffic to be brought up to the level so prescribed.

It appeared in the Wisconsin case that the loss in actual revenue, by reason of the refusal to permit the increase in State rates, would be approximately $6,000,000 per annum, and in the New York case approximately $12,000,000 per annum. This was an important difference in real revenue.

In sustaining the order of the Commission in the **Wisconsin Case** the Court said:

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress.

> It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to **substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce,** and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." (Emphasis ours.)

At other places in the opinion in the **Wisconsin Case** the Court stated that the Interstate Commerce Commission's authority to control intrastate rates arises only where such control is necessary to the "efficient regulation of interstate commerce" and only where "there is demonstrable injury and restraint upon interstate commerce which is real and substantial."

When the Court came to consider the previous order of the Commission in this case it found a different situation. The Interstate Commerce Commission had made no general investigation nor had it fixed a general level of rates. It had before it only the rates of the Atlantic Coast Line on logs from Florida to Georgia and within Florida. It fixed interstate rates only from a limited territory in Northern Florida into Georgia. It originally undertook to predicate its order upon an alleged finding of discrimination between persons and localities but sought to buttress this by a finding of unjust discrimination against interstate commerce generally. It was urged upon this Court that

if any burden existed against interstate commerce because of the effect upon revenues of the Florida rates, that such burden was not sufficient to be a real obstruction to interstate commerce and therefore did not come within the rule laid down by the Court when it first interpreted the Act so as to give the Commission the power to deal with State rates in order to remove a revenue burden on interstate commerce. The Court held that there were no findings made by the Commission sufficient to sustain its order. The Court expressly held that this defect was not procedural, but that there was a want of "basic or essential findings". The Court pointed out that the exertion of the Authority of the Commission to change State rates in order to remove a revenue burden on interstate commerce could only be sustained where such action was necessary to carry out the purpose of the Act. The Court said:

> "* * * the propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principal that whenever the Federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear."

It cannot be said that the removal of the burden, even assuming that any burden may exist, amounting to an indeterminate part of $100,000 per year "under normal economic" conditions is an "important" step in maintaining an adequate "national railway system" or that any such burden could constitute an "obstruction" to interstate com-

merce which is so "real and substantial" as to authorize the exercise of Federal power to supersede State power. Particularly is this true when it here appears that there is no longer any substantial disparity between the level of interstate rates and intrastate rates applicable generally in the Southern rate group, and the Cummer Scale of rates which is under attack. Even if the Commission possessed any statutory power in this connection the exercise of it under such circumstances would be arbitrary in the extreme.

POINT VII.

The Interstate Commerce Commission Has the Power to Prescribe Intrastate Rates Only When the "JURISDICTIONAL FACTS" Authorizing such Action Has Been Made to "CLEARLY APPEAR". The Existence of Such Jurisdictional Facts Is a Judicial Question Which Must Be Determined By the Judicial Branch of the Government Irrespective of Any Finding Which May Have Been Made By the Interstate Commerce Commission.

(Applicable to Assignments of Error 34 to 37 incl.)

In dealing with or fixing interstate rates the Interstate Commerce Commission is exercising a legislative and administrative function. Under such circumstances its findings can only be set aside when they are so wanting in support as in effect to constitute arbitrary action. A wholly different rule, however, is applicable to the Inter-

state Commerce Commission in dealing with intrastate rates. It has no power generally to deal with intrastate rates. And its power to interfere with them at all is conditioned upon the existence of discrimination against persons and localities in interstate commerce, or an unjust discrimination against interstate commerce itself. Unless those facts exist the Commission is without the power to act. Hence, those facts are jurisdictional facts. So, of course, the so-called substantial evidence rule does not apply. This Court has many times so held in effect. Thus, in the Florida Log Case, supra, this Court said:

> "* * * the propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the Federal power is exercised within what would otherwise be the domain of state power, the justification of the exercise of the Federal power must clearly appear".

In every instance where this Court has sustained the exercise of Federal power in derogation of state power in fixing state rates, the undoubted existence of a disparity and the substantial character of it has been pointed out. So, in the Shreveport case, supra, 234 U. S. 342, the Court said (346):

> "It is undisputed that the difference was substantial and injuriously affected the commerce of Shreveport".

In the Wisconsin case (supra) and in the New York Case (supra), the averred disparity was found to be $6,000,000 and $12,000,000 per annum, respectively, and the fact of the existence of the discrimination does not appear to have been questioned.

See also

Arkansas Railroad Commission vs. C. R. I. & P. R. R. Co., 274 U. S. 597;

Illinois Central Case, 245 U. S. 493;

Eastern Texas Railroad Co. vs. Railroad Commission of Texas, 242 Fed. 300, 307.

Indeed, this Court upon more than one occasion has held that it will not be bound by the findings of inferior Federal courts when state legislative or administrative Acts or orders are the subject of attack.

Knoxville vs. Knoxville Water Company, 212 U. S. 1.

So there can be no doubt that no finding of the Interstate Commerce Commission or of the District Court in this cause can or will preclude this Court from examining the record and determining for itself the basic facts upon which the jurisdiction of the Interstate Commerce Commission is dependent.

But the State of Florida and the Florida Railroad Commission at the very outset of this cause in the District Court demanded, and thenceforward insisted upon, a trial de novo before the District Court itself upon the existence of the basic facts upon which the Interstate Commerce

Commission assumed the jurisdiction to act in fixing the intrastate rates. But the trial court refused to grant a trial de novo. It held that when

> "* * * the very fact upon the existence of which the power to act depends has been contradictorily tried before the Commission itself, its conclusion fully expressed upon its record affirming the existence of the fact is certainly sufficient to put the burden upon those who deny it."

The State of Florida and the Florida Railroad Commission throughout the proceedings in the District Court did insist, and do now and will insist in this Court, upon their right to a trial de novo upon the basic and jurisdictional facts upon which the Interstate Commerce Commission assumed to have jurisdiction in fixing the intrastate rates. They rely upon

Crowell vs. Benson, 285 U. S. 22;

and the authorities therein cited in so doing.

The other appellants insist that the existence of the basic facts and the substantial character of them necessary to confer jurisdiction upon the Interstate Commerce Commission to enter the order which it did enter must be made to "clearly appear"; that the existence of no such facts have been made to "clearly appear"; that this Court will examine the record for itself and determine for itself whether there are findings which make it clearly appear and evidence supporting them which make it clearly appear

that such jurisdictional facts do exist. Florida Log Case, supra, Knoxville v. Knoxville Water Co., supra.

The appeal taken herein and the assignments of error filed herein are the joint and several assignments of the several appellants.

POINT VIII.

The Cost and Revenue Studies Founded Upon System Averages are insufficient to Supply the Essential Facts as to the Particular Traffic and Revenue and the effect of the Intrastate Rates Existing and Future Upon the Income of the Carrier.

(This is applicable to Assignments of Error Nos. 1, 2, 3, 5 to 11 incl., 14 to 31 incl.)

This feature has been discussed under Points IV and V of this Brief. The Appellants rely upon this point and the assignments of error applicable to it. No further discussion of it appears to be necessary at this time and place.

POINT IX.

The Rate Comparisons Furnish No Cause for the Invasion of State Domain By the Federal Power.

(This is applicable to Assignments of Error 1 to 5 inclusive, and 26.)

The opinion of the District Court and the Report dated July 5, 1932, of the Interstate Commerce Commission showed that both relied greatly upon the rate comparisons

which had theretofore been made by the Interstate Commerce Commission. We have already pointed out in the preceding portion of the brief the extent to which the Newly Reduced Rates had been established throughout the Southern and Southwestern Territory at the time the reports and orders of the Interstate Commerce Commission dated July 5, 1932, and January 9, 1933, became effective. The supplemental bills showed them to have been established in whole or in part upon 20 railroads in 13 Southern and Southwestern States in interstate and intrastate commerce. They had been established in interstate commerce on three railroads in Florida, namely, the Frisco System the Louisville & Nashville Railroad and the Georgia and Florida Railroad. They were found by the report of the Interstate Commerce Commission to be substantially on the same level as the Cummer Scale. There was attached to and made a part of each supplemental bill a map showing the extent to which these rates were effective at the time of the hearing of the second re-opened proceeding before the Commission. Suffice it to say that they are applicable upon all or part of most if not all of the lines whose rates were used by the Interstate Commerce Commission as standards of comparison in the Rate Comparisons referred to in its report of July 5, 1932, and by the District Court in its opinion.

We submit that the necessary inference with respect to the Newly Reduced Rates on those 20 railroads in those 13 states is that logs will not move freely in the South at rates substantially higher than the Cummer Scale—a thing which Florida shippers have been asserting throughout this proceeding.

POINT X.

There Were No Figures of Record Showing the Average Cost of Hauling Logs Over the Atlantic Coast Line System.

(This is applicable to Assignments of Errors 1 to 5 inclusive; 27 and 28).

The District Court in its opinion said:

> "On the question of the cost of the service, figures were considered which showed the average cost of hauling logs over the Coast Line System, exact figures for the particular traffic in Florida not being available."

We respectfully submit that there is no evidence upon which to base this statement.

The carrier by its so-called cost evidence and the Interstate Commerce Commission by its Appendix "E" to its Report of July 5, 1932, sought to convert system average costs for the transportation of all freight traffic into system average costs of log traffic by making certain arbitrary adjustments and expansions, but the results obtained bore no direct or proximate relation to the cost of handling the particular traffic in question, either upon the system or in Florida.

POINT XI.

The joint and several assignments of error are printed in the margin of this brief at pages 20 to 30 inclusive. Upon this appeal the appellants jointly and severally will rely and insist upon all of such assignments.

POINT XII.

No statement against the jurisdiction of this Court or motion to dismiss or affirm has been made by the principal appellees, United States of America or Interstate Commerce Commission.

SUMMARY

The Cummer Scale of rates, the lawful State rate, was voluntarily established by the carrier nearly twenty years ago. It was established after ten years operating experience on one branch line of its road. When it was established the record shows that the Florida Railroad Commission informed the carrier in effect that its doors were and would remain open to consider the level of the rate in the event that the carrier wished to change it. More than fifteen years went by and when this proceeding was first initiated by the Georgia Public Service Commission, the carrier defended the rate and in those proceedings expressly disclaimed any notion of altering it. After the first order of the Interstate Commerce Commission was entered the carrier intervened in defense of it. In 1929, when the first order of the Interstate Commerce Commission was

before this Court the carrier intervened in defense of that order. This was the first time in nearly thirty years operating experience under the Cummer Scale that any dissatisfaction of it was expressed by the railroad company. And that dissatisfaction has never yet been expressed in the only forum which has the jurisdiction to determine the "reasonableness of the rate per se", viz., the Florida Railroad Commission.

Twenty railroads operating between and in thirteen or more Southern and Southwestern States were permitted by the Interstate Commerce Commission to institute Newly Reduced Rates which are as low or lower than the Cummer Scale. Those Newly Reduced Rates were substituted for higher rates which were among the chief standards of comparison employed by the carrier and the Interstate Commerce Commission, and upon which great reliance was placed by the carrier in the evidence and by the Interstate Commerce Commission in its report and order of July 5, 1932.

The so-called cost studies prepared by the carrier but discarded by the Commission, and the cost study unlawfully prepared and relied upon by said Commission (Exhibit E to the Commission's report) were all based upon system averages and system averages have not only been repeatedly condemned by the Interstate Commerce Commission in its own reports and by this Court in its adjudicated cases, but were likewise condemned by the Interstate Commerce Commission in the very report under attack.

In addition to all this the Commission did not make the findings required by this Court in the Florida Log Case,

supra, and could make no such findings from the evidence in the record before it. Not only did it make no findings as to the amount of revenue which had been derived in the past from the traffic in question under the existing intrastate rate (the Cummer Scale), but it refused to require the carrier to produce evidence upon this subject, although repeatedly urged by the State and by the interveners herein to require the carrier so to do. It made no finding as to the amount of revenue which could reasonably be expected to be derived from the traffic in question under the increased intrastate rate which the Commission proposed to establish. The Commission made certain indefinite conjectures in this connection which were not findings and which were applicable solely to what revenue might be derived under normal economic conditions, while at the same time recognizing the present existence of abnormal economic conditions, and making no finding or guess when the present abnormal conditions would cease and normal conditions return. There was no evidence before the Commission upon which it could make this particular finding required by this Court either with respect to normal or abnormal times. The Commission failed to demonstrate by its findings that any burden which did exist was of such character and consequence that it was the affirmative duty of the Commission as an important step in the maintenance of an adequate national transportation service to remove the same, or, "that the alteration of the intrastate rates" would "produce or was likely to produce" an additional and greater amount of income and that such additional and greater amount of income was actually necessary to prevent "an undue burden upon the carrier's interstate rev-

enues" and necessary to maintain an adequate (national) trasportation service, nor was there any evidence before the Commission upon which those findings could be made.

The one thing that is demonstrated by the report of the Interstate Commerce Commission is that there will be no interstate commerce in logs at the interstate rate prescribed approximately four years ago, and in force and effect for two years. It has demonstrated the accuracy of the forecast made by the Florida shippers that the unlawful order of the Interstate Commerce Commission originally entered in this proceeding not only destroyed prosperous communities and millions of dollars in property, but likewise for the time being at least almost completely destroyed the traffic in pine logs, and when that unlawful order was set aside by the order of this Court, it was rapidly destroying the lesser traffic in cypress and hardwood logs. And to a like extent destroying the revenue derived from that traffic, as this Court said might happen.

The truth is that from the very beginning of this controversy, the Interstate Commerce Commission, the carrier and the District Court have assumed that the power and duty of the Interstate Commerce Commission to deal with this State rate was no less than its power and duty to deal with interstate rates in general, without regard to the power and duty of the State in that connection, and without regard to peculiar local conditions surrounding the establishment and operation and maintenance of the state rate.

CONCLUSION

We submit that appeal in this cause is a matter of right; that the statement of the appellee Atlantic Coast Line Railroad Company against the jurisdiction of this Court is without merit, and that the motion of the Atlantic Coast Line Railroad Company to dismiss the appellants' appeal or to affirm the decree of the court below ought to be denied.

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APPENDIX

STATUTES RELIED UPON

The Interstate Commerce Act, (41 Stat. L., 474):

Section 1:

"(1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—

from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such

transportation or transmission takes place within the United States.

(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States, as aforesaid; or

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this Act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

"(5) All charges made for any service rendered or to be rendered in the transportation of * * * property * * * shall be just and reasonable, and every unjust and unreasonable charge for such

service or any part thereof is prohibited and declared to be unlawful."

Section 2:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3:

"(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect

whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 13:

"(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investi-

gating said complaint, it shall be the duty of the Commission to investigate the matter complained of in such manner and by such means as it shall deem proper.

(2) * * * The Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders of the payment of money.

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear

and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or

charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Section 15:

"(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged or collected, by any common carrier or carriers subject to this Act for the transportation of * * * property * * * as defined in the first section of this Act, * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized

and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect, any rate, fare or charge, for such transportation * * * other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be * * * ."

Section 15a:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management, and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of

transportation. Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust and unreasonable, and to prescribe different rates for different sections of the country."

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time

to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part

of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier, receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission find are under common control and management and are operated as a single system, shall be computed for the system as a whole, irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4)."

The District Court Jurisdiction Act (C. 32, 38 Stat. L., 219):

"The Commerce Court, created and established by the Act entitled 'An Act to create a Commerce Court and to amend the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes,' approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment * * *.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation, or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does

not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a thorough shipment, the term 'destination' shall be construed as meaning final destination of such shipment.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operations, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges

shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit; *Provided*, That in cases where irreparable damage would othrewise ensue to the petitioner, a majority of said three judges, concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given

precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the state.

The Commerce Court Act C. 309, 36 Stat. L., 539):

"SEC. 1. That a court of the United States is hereby created which shall be known as the Commerce Court and shall have the jurisdiction

now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

Nothing contained in this Act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this Act shall not affect the jurisdiction now possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes."

"Sec. 211. All cases and proceedings in the Commerce Court which but for this chapter would be brought by or against the Interstate Commerce Commission, shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved."

"Sec. 212. The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court; if in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their com-

pensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their ation: *Provided*, that the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suit: *Provided, further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this chapter, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute,

defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General of the United States therein.

"Sec. 213. Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel and under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

Act of February 13, 1925 (C. 229, 43 Stat. L. 936).

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 128, 129, 237, 238, 239, and 240 of the Judicial Code as now existing be, and they are severally, amended and re-enacted to read as follows:

* * * * *

"Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

* * * * *

(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the

review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

Act of January 31, 1928 (C. 14, 45 Stat. L. 54).

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That the writ of error in cases civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Sec. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required; *Provided, however,* That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

Act of April 26, 1928 (C. 440, 45 Stat. L. 466).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of an Act entitled "An Act in

reference to writs of error," approved January 31, 1928, Public, Numbered 10, Seventieth Congress, be, and it is hereby, amended to read as follows:

"Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

Act of October 22, 1913 (C. 32, 38 Stat. L. 220)—Judicial Code, Section 210.

"A final judgment or decree of the Commerce Court (district court) may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the Commerce Court (district court) may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court (district court) as the case may require. Appeal to the Supreme Court, however, shall in no case

supersede or stay the judgment or decree of the Commerce Court (district court) appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme Court, or the justie of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or deree of the Commerce Court (district court) granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court." (36 Stat. L. 1150.)